

**Bohemia, Inc. and International Woodworkers of America, Local Union No. 3-246, AFL-CIO.
Case 36-CA-3951**

May 11, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On June 30, 1982, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bohemia, Inc., Culp Creek, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ The Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "(T)otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolution with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

² Member Jenkins does not rely on *Wright Line, Inc.*, 251 NLRB 1083 (1980). That decision concerns identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT threaten our employees by indicating that employees have been terminated or otherwise discriminated against because of their union or other protected concerted activities.

WE WILL NOT question our employees regarding statements, affidavits, or depositions that may be given to an official investigator of the National Labor Relations Board.

WE WILL NOT discharge employees and fail to reinstate them because of their union membership and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Robert D. Mock for any losses he may have suffered as a result of our unlawful discrimination against him, with interest, and WE WILL offer him immediate reinstatement to his former job or, if such job no longer exists to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL expunge from our files any reference to the disciplinary discharge of Robert D. Mock on February 20, 1981, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

All our employees are free to engage in concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection. Our employees are also free to refrain from any or all such activities.

BOHEMIA, INC.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard before me at Springfield, Oregon, on February 17, 18, and 19, 1982,¹ pursuant to a complaint issued by the Regional Director for Region 19 on September 29, 1981, and which is based on a charge filed by International Woodworkers of America, Local Union No. 3-246 (herein called Union), on August 7, 1981, and which was amended on September 25, 1981. The complaint alleges that Bohemia, Inc. (herein called the Company or Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent denies committing any violations of the Act.

Issues

Whether or not Respondent:

1. Discharged Robert Mock because he joined, supported, or assisted the Union, and engaged in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. On or about July 29, acting through admitted supervisor Bill Blain, threatened an employee by indicating that union activity was the motive for Robert Mock's discharge.

3. On or about September 9, acting through admitted supervisor Frank Trader, interrogated an employee about his testimony given to a Board agent during the investigation of the instant case.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were timely filed on behalf of the General Counsel, Charging Party, and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is an Oregon corporation engaged in the preparation of wood products and has a production facility located at Culp Creek, Oregon. It further admits that during the past year, in the course and conduct of its business, it has sold and shipped goods and materials valued in excess of \$50,000 from its facility di-

¹ All dates herein refer to 1981 unless otherwise indicated.

rectly to points outside the State of Oregon. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

The alleged discriminatee, Robert Mock, was employed at the Company's Culp Creek plywood facility for approximately 6 years. A sawmill is also located at the Culp Creek facility.² The sawmill has separate supervisors which are not involved in this proceeding. For most of the time, the plant superintendent was Walker (Heavy) Breeden, who was assigned as plant superintendent at another Bohemia facility at Junction City, Oregon, in October 1981. Breeden's assistant at Culp Creek, Richard Coomler, assumed Breeden's duties at Culp Creek in October 1981 and continues to hold the job of plywood superintendent at the facility. Both Breeden and Coomler are admitted to be supervisors as defined in the Act.

Mock was discharged on February 20, 1981. At the time of his discharge, he was classified as an "A stacker-driver" on the graveyard shift.³

B. Mock's Union Activities

Mock became a member of the Union on the day he commenced working for Respondent. It is undisputed that he was considered a very fine stacker-driver.⁴ This job demanded that he supply a production line with material which required a rapid and consistently attentive worker;⁵ and Frank Trader, once his supervisor, told him Coomler said he was "Supervisor material." In early June 1980, Mock became a shop steward.

Approximately 1 month prior to becoming a shop steward, Mock heard that the graveyard shift was to be laid off for 1 week. According to Breeden's uncontested testimony, since the Company "was out of orders because the market was bad," he got approval from the

² Although afforded the opportunity, Respondent failed to demonstrate that the sawmill followed the same company rules as the plywood operation and/or that there was a similar application of company rules.

³ Mock filed a grievance over his discharge which was ultimately denied by Bohemia. There is no contention that the grievance procedure exhausted or limited Mock's remedies nor is it contended that the filing of the grievance limits the scope of the instant proceeding in any manner.

⁴ Larry Bowman, a current employee of the Company, testified, without refutation, that in 1979 Blain, Mock's foreman, said Mock was the best stacker-driver he had ever seen.

⁵ There was no testimony detailing the requirements of Mock's job but the overall sense of the evidence indicates that the job requires a quick, "hard" worker and that Mock met this need. Breeden testified, without refutation, that the Company does not keep work rating slips or any other kind of written record of employees' work performance. The only record of work performance is the supervisor's or foreman's daily diaries. No diaries were placed in evidence.

Union's chief operating officer⁶ to lay off the graveyard shift. Later the same week, shortly before the end of the work week, Johnson informed Breeden and Neil Hammond, Respondent's personnel director, that the Company would have to go through the bumping procedure as provided in the contract rather than laying off an entire shift.⁷ Inasmuch as there was less than an hour to the end of the shift, which afforded insufficient time to implement the contract's provisions, it was decided to close the entire plant for 1 week. After the employees returned to work, Breeden learned that it was Mock's complaint to the Union that caused Johnson to require the Company to use the bumping procedure, hence causing the plant closure.

According to Mock, when he returned to work after the temporary plant shutdown, he was told by Tobin that "Dick [Coomler] and Heavy [Breeden] were telling the people on day shift that the reason why they were out of work was my [Mock's] fault, because I had went down to the union hall and complained about the layoff." Respondent objected to this testimony as hearsay, and it was provisionally admitted pending determination of Tobin's status. Respondent has also made a motion to strike all testimony purporting to relate statements of Tobin. Tobin did not testify.

1. Tobin's status

According to Coomler, during the past several years, pursuant to Coomler's request, Tobin filled in for vacationing supervisors. Coomler estimated that Tobin filled in for foremen a total of 2 weeks during the past 2 years, and prior to that he estimated a total of about 3 weeks per year. Tobin did not have the authority to hire, fire, or otherwise discipline employees; he could not handle employee grievances.⁸ Tobin was called "a coordinator" by Coomler, coordinating the tasks Coomler wanted completed during the appropriate shift. To accomplish this task, Tobin would ensure that the employees were on the job and that the materials are placed into the various areas of production to accomplish the assigned task. Tobin also assertedly did not have the authority to reprimand employees and, about a year prior to the hearing, complained to Coomler that this lack of authority resulted in employees taking advantage of him by taking long breaks. Therefore he asked not to be assigned as a coordinator on other shifts. Contrary to the practice of paying foremen monthly, Tobin is paid his usual hourly rate; but he receives an extra hour's pay for each shift he works for the vacationing foreman. Coomler also noted Tobin did not attend the regularly scheduled supervisor meetings.

According to Mock, Tobin occasionally worked as "relief foreman" on his shift and during those occasions

would tell the employees where to work and what to do, a role normally performed by Bill Blain, the foreman. Mock also understood Tobin's regular duties included instruction of certain day-shift employees and, until he heard the testimony given during this hearing, believed Tobin could discharge people. Mock's testimony is corroborated by Garth Roy de Garlis, an 11-year employee of the Company, who stated that from time to time Tobin took the place of his absent foreman, Frank Trader, assuming the foreman's duties. De Garlis observed that Tobin did not engage in any physical labor when he took Trader's place, and Tobin reprimanded the crew for taking too long a break. The day after the reprimand, de Garlis was called to the office and, in the presence of Coomler, Breeden, and Trader, he was told that he was not doing his job and, if he did not work harder, "he'd be going down the road." Subsequently, de Garlis spoke to Tobin:

I asked Mr. Tobin—I didn't really feel it was his duty to be playing foreman anyway, and he told me that the supervisory personnel actually asked him why he didn't get out the production that they expected. He told me that he just had to give them some answer.

I just asked him if I had to get along with him to work for him, and he said no, I didn't. [Emphasis supplied.]

This record amply demonstrates that on occasion Tobin served as a substitute foreman and then acted as a conduit between Coomler and Breeden on the one hand, and the Company's employees on the other hand, by distributing work assignments and conveying work-related information. The question posed by de Garlis, as quoted above, indicates that, although he questioned Tobin's "duty to be playing foreman," believed that he was "work[ing] for him." Mock believed that during his employment with the Company that Tobin could fire him. Tobin's responsibilities as replacement foreman served to set him apart from other employees and to leave no doubt that he enjoyed a distinct position wherein the employees would reasonably believe that his statements reflected company policy. *Jules v. Lane, D.D.S., P.C., 262 NLRB 118 (1982)*, and cases cited therein. Therefore, it is concluded that, regardless of his supervisory status, Tobin was and could have reasonably been viewed by the employees as, the Company's representative; as "clothed with the implied authority to act for management." *Quality Drywall Co., 254 NLRB 617 (1981)*. This conclusion is buttressed by the unrefuted testimony of de Garlis that Tobin reprimanded employees and shortly thereafter de Garlis received a verbal warning from admitted supervisors. By this action, the Company confirmed the employees' belief that Tobin was acting as Respondent's representatives and hence confirmed his agency status. Therefore, his statements are imputable to the Company⁹ whether or not these acts "were activities

⁶ At the time of this incident, Keith Johnson held this office. Subsequently, he was succeeded by Robert L. Frazier.

⁷ Breeden stated that the collective-bargaining agreement has a provision detailing the procedure to be used in the event of major curtailment in work. Mock testified without contradiction that the collective-bargaining agreement provided layoffs were to occur in inverse order to hiring.

⁸ This limitation is apparently similar to the regular foreman's duties or job circumscriptions of authority inasmuch as Breeden indicated without contradiction that foremen forwarded all grievances to the plant superintendent, foremen "did not handle employee grievances."

⁹ See *Machinists (Serrick Corp.) v. NLRB*, 311 U.S. 72 (1940), wherein the Board held:

Continued

authorized or subsequently ratified."¹⁰ Since Tobin is found to be an agent of Respondent, testimony about his statements is not hearsay.¹¹

Mock further credibly testified that Bill Blain told him that "Dick and Heavy were a little unhappy with me because I had complained about that layoff, and they had to shut the mill down." Blain's testimony that he told Mock that Coomler and Breeden were unhappy with him because he was soliciting grievances, is credited only insofar as it corroborates Mock's testimony based on demeanor, Mock's superior recall, inherent probabilities, consistency with Tobin's unrefuted statements and the other variant factors considered in determining credibility. See *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976). It is therefore found that, while the Company may have been "unhappy" with Mock for engaging in union activities after he became a steward, their unhappiness began and was directly attributable to Mock's activities regarding the proposed layoff of the graveyard shift.

2. Mock's activities after becoming a steward

After Mock became a shop steward, he filed three personal grievances. The first grievance was filed June 6, 1980, and dealt with job-bidding procedures. The second grievance, filed July 15, 1980, was related to the first grievance and also dealt with the Company's application of the job-bidding procedures to bids made by Mock.

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondent superior. We are dealing here not with private rights (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. [Footnote omitted.] Here there was ample evidence to support that inference. As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that.

¹⁰ See Sec. 2(13) of the Act. See also *Town & Country Supermarkets*, 244 NLRB 303, 308 (1979); *Clevenger Logging*, 220 NLRB 768, 778 (1975); *Broyhill Co.*, 210 NLRB 288, 294 (1974); and *Our Way, Inc.*, 238 NLRB 209, 213 (1978), wherein it was found statements are "chargeable to Respondent Employer for the additional reason that he had been placed in a strategic position whereby employees could reasonably believe that he speaks on its behalf."

¹¹ Fed. Rules Evid. Rule 801(d) 2(D). See *Rubber Workers Local 878 (Goodyear Tire & Rubber)*, 255 NLRB 251 (1981), wherein the Board held, in fn. 1, that:

The Board has decided that it is not bound to apply strictly the Federal Rules of Evidence concerning hearsay. *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978). In any event, the statements involved herein fall within the definition of an admission by a party opponent, and therefore are not hearsay. (Fed. R. Evid. Rule 801 (d)(2).)

See, further, *Our Way, supra*, and *Injected Rubber Products Corp.*, 258 NLRB 687 (1981).

The claim of Mock that he won these grievances is undisputed. Also, Mock testified, without refutation, that prior to becoming a steward he never experienced problems changing jobs by the established bidding process; it was only after he became a steward that he experienced difficulty in bidding on jobs. The third grievance was filed on or about October 30, 1980. This grievance dealt with the distribution of overtime. When Mock presented this overtime grievance to Coomler and Breeden, "He [Breeden] told me that I was nothing but a goddamned troublemaker. He [Breeden] said that I had fucked everybody in the mill . . . and he [Breeden] told me, if you two [Mock and Roger Crawford¹²] don't knock it off . . . there'll be people looking for work this winter." Breeden denies making this statement. Roger Crawford testified, when asked if Breeden threatened Mock's employment or job, "It seemed like he did but he couldn't testify that he did . . . it's very possible [Breeden said Mock would be looking for a job if he doesn't quit filing these grievances]. I can't swear to it but I believe he did." This statement is found to be corroborative of Mock, not a denial but a statement of belief to the best of his recollection. Roger Crawford, who got into a fist fight with Mock and exhibited a dislike for him, is still employed by Respondent. These factors lead me to find his testimony credibly corroborative of Mock's.¹³ Inasmuch as the statement is not alleged in the complaint or otherwise to be a violation of the Act and there is no indication that Respondent felt that such a violation was in issue, it is found that the matter cannot be considered fully and fairly tried. Therefore Breeden's statement will be considered only as background in determining matters in issue.

Mock also handled approximately four grievances filed by other employees while he was a union shop steward. One such grievance involved the elimination of 15 minutes overtime pay to an employee for extra work even though he was expected to continue performing the extra work. Also, Mock presented a grievance by a senior employee who claimed he should have been working instead of a junior employee. Coomler, during the presentation of this grievance, according to Mock, whose testimony is credited for the reasons stated above, "told me that they wasn't going to pay Charley Thompson because they felt that I solicited the grievance." Another grievance also involved an overtime claim. Mock handled the grievance of Jim Stout who claimed he was assaulted by a supervisor. Mock signed a grievance for an individual discharged for absences but Keith Johnson handled the matter for the Union. Mock also assisted in the Rick La Blue grievance where La Blue was discharged for horseplay; however, Tom Potter, another steward, wrote the grievance up. According to Robert

¹² Crawford was a shop steward and grievance committee chairman who signed Mock's grievance and participated in the presentation of the overtime grievance to Respondent.

¹³ The testimony of current employees is entitled to considerable weight since it is unlikely to be false when such testimony is adverse to an employee's pecuniary interests. See *Shop-Rite Supermarket*, 231 NLRB 500 (1977); *Georgia Rug Mill*, 131 NLRB 1304, 1305, modified on other grounds 308 F.2d 89 (5th Cir. 1962), and *Le Roy Fantasies*, 256 NLRB 211 (1981).

L. Frazier, current president and business agent of the Union, there was only one grievance filed during the 5-month period immediately prior to Mock becoming a steward, and, in the 6-month period after Mock became a steward, there were 16 grievances filed. Frazier did not determine whether all 16 grievances were filed by Mock.

During the time period Mock was a steward, there were several reported incidents that Coomler admitted played some role in his decision to terminate Mock. As mentioned above, a complaint was lodged with the Union that Mock was conducting union business when he should have been working. Frazier instructed Mock as to when he could conduct union business. Blain admits that Breeden was "unhappy" when Blain informed him that "Mock [talked] to people on the chain and stuff like that."¹⁴ According to Blain, he told Mock that he was not to engage in this activity at least 1 month prior to Mock's discharge. Blain also stated that stewards were not supposed to solicit grievances "or anything such as that on company premises or company time"¹⁵ for it was against the rules. The rules that Respondent placed in evidence do not contain a prohibition against soliciting grievances on company time or company premises. There is no indication that Mock, subsequent to these warnings by Blain and Frazier, failed to comply with these requests and/or failed to meet his job objectives with the requisite dispatch and attention.

As previously indicated, Roger Crawford was a steward when Mock became a steward and was involved in several incidents pertinent to this proceeding. One incident involved a conversation Crawford had with Breeden when he was presenting Breeden with a grievance Mock filed and, although he could not remember what Breeden said, he knew Breeden was upset about the grievance and he may have used foul language. Roger Crawford does not recall any mention of Mock's job being in jeopardy, but he does recall telling Mock that he should "lay low" as a steward. Mock's much more detailed version of the event is credited. One morning around 7 a.m. during the pendency of Mock's overtime grievance, Breeden walked into the mill and started to talk to Crawford. Crawford looked around, then made a gesture to Mock. The gesture was a slashing motion across the throat as he held the thumb and index finger slightly apart, the gesture for just a little bit. Mock interpreted the gestures as indicating he was close to being fired. Mock therefore went to Tom Potter's home, woke him up, and met at the union hall with Potter, Crawford, and Johnson. During this meeting it was concluded that Mock should "lay low, not . . . write up any more grievances, I was extra careful about what I did, that I didn't make any mistakes . . . and I avoided incurring their wrath as much as possible."¹⁶

¹⁴ There was no contention that the Company had any rules regarding talking during working time. There is a company rule prohibiting "neglect of duty or loafing on the job," but there was no showing that during possible slack periods of work employees were prohibited from talking.

¹⁵ There was no contention that the maintenance of such a rule was violative of the Act; hence the matter cannot be considered fully and fairly tried.

¹⁶ Mock's testimony is corroborated by Potter, as follows:

About 3 weeks to a month after the throat slashing gesture incident, Crawford testified that he resigned because he was going to a doctor because he was very nervous. "Mock was all the time wanting to know about certain things and kept me bugged while I was trying to do my job." Crawford stated that Mock "very possibly was following up some grievance" or acting consonant with his position as shop steward. Subsequently, Crawford testified that Mock said to him, "You lie, I stand behind you; if I lie, you stand behind me." Crawford also asserted that "there was quite a few occasions that he'd [Mock] come up and talk to me and get in my way when I was working." Crawford reported the statement about lying to Blain a few days after it was made and he believes Blain then related the report to Coomler and Breeden. Crawford also testified that other than these asserted statements, he has no basis to believe that either Potter, Frazier, or Mock are liars or that Mock ever lied about any grievances. Mock denies making the asserted statement and Potter testified that Mock never suggested that he ought to lie in furtherance of a grievance, "quite the contrary." This testimony of Crawford is not credited but rather is considered solely in conjunction with the other evidence in considering whether Respondent's discharge of Mock was unlawful.¹⁷ Coomler stated he had two reasons for doubting Mock's propensity for veracity: First, the statement of Crawford and, secondly, during the handling of the La Blue grievance, Mock stated that the witnesses gave him a different story. Coomler asked these employees if they told Mock something different than they told him; so he concluded that someone was lying and decided it was Mock. Coomler never confronted Mock about the matter or any other incident, he just determined he would not use Mock any longer as a steward.

Other incidents indicating Respondent's attitude toward Mock include an incident with James A. Stout.¹⁸ About a month to 6 weeks before Mock's termination, Stout had occasion to consult Mock in his capacity as union steward. Breeden came over and told Mock that, if

Well, Bob had contacted me and he was afraid that he was going to get fired for writing grievances, that the company was down on him because he had caused a lot of trouble there for the company. I told him not to worry about it, you know, and I didn't think that was going to happen.

Well, he was really concerned about it, and we eventually got together with Roger Crawford and went down to the union hall and discussed the problem with Keith Johnson.

We kind of unanimously decided that Mock had better mellow out, lay low for awhile. I believe that was the terminology that came out of the conversation—keep a low profile. Johnson did not appear and testify.

¹⁷ Coomler stated he had a poor opinion of Mock's reputation for truthfulness. Crawford had told Coomler that he quit being a steward because "Mock had made the statement to him, you lie for me on these grievance matters and I'll lie for you. He [Crawford] said that he did not think that he should have to conduct union business in that manner, therefore, he was going to quit." Coomler suggested Crawford talk to Johnson of the Union. It is noted that Crawford testified that Blain reported the matter to Coomler, further indicating a lack of candor in his testimony. It is also noted, in determining credibility, that Mock testified Crawford told him he decided to quit as steward for Johnson ignored him when he was last at the union hall.

¹⁸ J. Stout is a current employee of the Company and his testimony is credited based on the above-stated criteria.

he didn't have anything better to do than just sit and shoot the breeze, that he should get in the back room and straighten it up. Stout drove away and about 1-1/2 hours later, Breeden came over to Stout and told him Breeden did not have anything against Stout, "that he had just had it with that trouble-making Mock, and he just couldn't handle it anymore." Breeden did not deny making the statement. This testimony further supports the prior finding that the Company did not maintain a work rule prohibiting talking during working time if it did not result in neglect or other impairment of work.

Mock testified, without refutation, that on or about October 15 he was talking to Tobin after work when Al Baker, a foreman on the day shift, walked up to him and told him to leave the mill, that Heavy Breeden did not want him in the mill. A couple of days later, Mock asked Tobin what was happening. Tobin replied "that Heavy had told them that he did not have anything against him [Tobin], but that's all that was said" To Mock's knowledge, no other employees were instructed to leave the premises after work. In fact, the same day Mock observed a coworker stay after work talking to Breeden. Mock asked this coworker if he was asked to leave the mill by Breeden, and he said no, Heavy "was really nice." This same coworker, Penny Barry, was observed many times, as were other employees, talking to coworkers in the mill after their shifts ended. There was no refutation of this observation. Mock further claims, without dispute, that his overtime was greatly diminished after he became a steward but attributed much of the diminution to the slump in the economy.

Frazier testified that Hammond talked to him about Mock prior to a grievance meeting. This discussion occurred within a month of Mock's handling the "La Blue matter." Hammond said that the Company had a problem with Mock being a representative of the local as shop steward because they thought that Mock was actively soliciting grievances, and that the Company had difficulty with that concept. Also Hammond stated they heard, from an unnamed source, that Mock stated he would lie in order to resolve grievances. Frazier replied that he doubted Mock was the type of individual who would lie to resolve grievances. As far as the question of soliciting grievances was concerned, Frazier said that, if the contract were being violated, it was the shop steward's obligation to the local to pursue those violations, either through the foreman or through the grievance procedure. Frazier told Hammond he would check into the allegations and discuss the matter with Mock. Frazier discussed the allegations with Mock, instructing him not to conduct union business on company time. Mock assured him he was not doing so and stated he felt he was being harassed by his supervisor. Mock had previously indicated to Frazier, two or three times prior to the Hammond conversation, that he felt harassed by his supervisor. Frazier understood Hammond's statement to imply that the grievances were solicited for poor or invalid issues. He reviewed all the grievances raised by Mock and found they all contained valid issues, there was nothing wrong with them. Frazier noted that the number of grievances filed after Mock's discharge has decreased by about 50 percent.

Richard F. Ourada, another union steward, thought Mock was an excellent steward. Mock "would present a case . . . he stayed right . . . to the point . . . without backing away . . . unless he found that something was wrong with the case . . . but if the employee was right, he was right," indicating that Mock would then back up the employee to the best of his ability.

Finally, Jeffrey Millbrandt, a current employee of the Company, testified credibly, with clear recall, candor, and forthright demeanor, that about 3 weeks prior to Mock's discharge, Frank Trader¹⁹ told him "that Dick [Coomler] was out to get Bob [Mock] because of his involvement with the Union."

C. The Fight

The parties stipulated that a fight between Mock and Crawford occurred on February 19 at approximately 8 a.m., after the end of the graveyard shift. Preceding the fight, Respondent, through Coomler and Blain, placed unit member Mickey Barnes on 30-day probation for they determined that he was unresponsive to prior warnings regarding his poor work habits. Consonant with the Company's practice, a steward, Dick Ourada, was asked to be present when Mickey Barnes was informed that he was being placed on probation.²⁰ During the colloquy, according to Blain, Mickey Barnes asked why he was in the office and what he did wrong. Coomler did most of the talking, and Mickey Barnes' inquiries were unanswered, but there was a reference to checking further with Roger Crawford if Ourada or Mickey Barnes wanted to hear more about the basis for placing Mickey Barnes on probation.²¹ Referral to Crawford, according to Coomler, was occasioned by the fact that he had signed the prior warnings given to Mickey Barnes. These written warnings were not introduced into evidence.

Blain also testified that he told Roger Crawford to keep an eye on Mickey Barnes prior to placing him on probation. Blain did not recall when he made the request, whether it was a week or a month prior to Mickey Barnes being placed on probation. The request of Crawford to watch Mickey Barnes was to keep the union representative informed so that they would approximate the merits of the Company's position with regard to one of their members. Roger Crawford said he complied with the request to familiarize the Union with the "conflict" and determine if the Company's position was meritorious. Roger Crawford stated he was asked to watch Mickey Barnes when he was a steward. When asked if he reported to the Company the observations he made of Mickey Barnes, he replied, "I don't believe so much." Further, Crawford testified that he warned Mickey Barnes he was being watched by the foreman. Crawford could not recall if he talked to Blain or anyone else immediately before Mickey Barnes was

¹⁹ Trader, a foreman in the plywood section, denied telling Millbrandt or any other employee that Coomler or Breeden was out to get Mock or that Mock was told to watch out. This testimony is not credited, based on demeanor and application of the above-stated criteria.

²⁰ Probation, according to Blain, is a trial period during which the employee has to work to a specified standard.

²¹ Coomler admitted referring Ourada to see Crawford about Mickey Barnes' prior warnings.

called in and told he was being placed on probation. Crawford did not say when he stopped "watching" Mickey Barnes; he does not believe he was keeping him under surveillance in February 1978, but he recalled an incident in the lunchroom which occurred in January or February 1981. Therefore it is unclear whether Roger Crawford continued watching Mickey Barnes after he resigned as steward. Mickey Barnes was also a job steward at the time Roger Crawford was asked to "watch" him.

Coomler specifically requested Ourada to be the steward present during the Mickey Barnes probation meeting, even though Ourada was on the day shift, because "I would rather deal with Mr. Ourada than Mr. Mock because I feel, because of the La Blue incident that I just explained, Mr. Mock does not handle things truthfully."²² Also, Coomler heard that Don Daves was a steward, but he never used Daves as a steward because "I didn't really consider Daves a steward . . . I have the option, as far as I know, to use any steward I choose . . . Mr. Ourada is the senior job steward, and I had dealt with Mr. Ourada on several occasions for about these last 15 years."

In accord with Coomler's suggestion, Ourada telephoned Mock at Mock's house, informed him of the Company's decision, and further said that Coomler "told him to see Roger Crawford about Mickey Barnes' working problems, or whatnot, and asked me [Mock] if I would handle it on graveyard." Mock expressed reticence in getting involved for "I was supposed to be laying low, to stay out of trouble with him after the threats that I'd gotten from him." Mock subsequently agreed to talk to Mickey Barnes about the probation decision. That evening, Mock asked Daves to investigate the matter and to report back with an opinion as to the basis of the Company's action. Daves reported back that he felt Blain was "just harassing Mickey [Barnes] again."²³ Mock then asked Daves to consult with Mickey and Matthew Barnes²⁴ to ascertain if they wanted to talk to Crawford about the probation matter. Mock did not know why Coomler told Ourada to consult Roger Crawford since Crawford had resigned as shop steward a couple of months earlier, but opined that Crawford had made statements about Mickey Barnes. Daves did not give Mock the Barnes brothers' reply during the work shift.

After work, as he was leaving the mill, Mock walked across a bridge which traverses a waterway on Respondent's property, and encountered the Barnes brothers and Daves. Matt Barnes asked Mock to talk to Crawford to "get this out in the open, find out what he said." Daves testified that originally he was to talk to Crawford but, since he was hot-tempered and less experienced as a steward than Mock, he figured it would be better for Mock to talk to Crawford. For these reasons, Mock agreed to talk to Roger Crawford.

²² As previously indicated, Coomler never confronted Mock with this allegation of untruthfulness during the La Blue grievance proceedings or any time subsequent thereto.

²³ Daves did not refute Mock's version of this conversation.

²⁴ Matthew is Mickey Barnes' brother who also worked for Respondent on the graveyard shift.

Mock walked up to Roger and Diane Crawford,²⁵ who had crossed over the bridge and were walking toward the parking area, which is also, unquestionably, on company property.

There are two primarily divergent renditions of what occurred next, that of the Crawfords and the version of Mock supported by Daves and several other observers. The Crawfords assert that Mock walked up to Roger Crawford and accused him of "ratting on Mickey Barnes and getting Mickey in trouble." Roger Crawford suggested that they confer with Coomler, and Mock replied Coomler is nothing but a liar. There was an allegation that Crawford was spying on Daves and the Barnes brothers which Roger Crawford denied. Then Roger Crawford claims he suggested they check his activities with Blain, and Mock responded by saying that Blain "is nothing but a liar." Also, Mock claimed Crawford took the Company's side on grievances. To that allegation, Crawford asserts he suggested they go talk to Keith Johnson at the union hall and Mock reportedly replied that the union officials "don't tell the truth." At this point, Diane Crawford stepped in between the men, saying, "Roger is not a liar." Mock then is said to have replied, "shut your smart fucking mouth." Roger Crawford testified that the use of expletives toward his wife greatly angered him and he cannot recall what he did next, if he hit Mock or vice versa. However, a fight did ensue.

According to Diane Crawford, after Mock used the language of billingsgate toward her, Roger Crawford said Mock could not talk to his wife that way; to which Mock rejoined, "Well, come on, let's fight." Diane then says she told them it was not worth fighting about and then Mock "made some kind of a statement that if I didn't move I was going to be the first one down." Roger then gave her his lunch pail and pushed her out of the way. Mock, according to Diane, swung first.²⁶ After the fight started, Diane Crawford tried to keep between her husband and particularly Daves, who was described as egging Mock on by saying "hit him again, hit him again, Bob . . . when you get done with him, it's my turn, it's my turn," and "don't let him get too close to you." She asserts she told Daves to stay away and leave "him" alone, to which Daves assertedly replied, "that she had better shut her mouth or she was going to get it too." Two guards employed by the Company then appeared and Diane Crawford asked them to get help. The guards telephoned Coomler and all agree that as soon as Coomler's approach toward the fight scene was announced, participants and spectators alike immediately headed for their cars and departed the premises.

Mock gives a significantly different rendition of the events leading up to the fight.²⁷ Mock asserts, as here

²⁵ Diane Crawford is Roger Crawford's wife and she is also employed by the Company, working the graveyard shift.

²⁶ The Crawfords' testimony was almost identical, using the same or similar verbiage. The only point of divergence was who swung first; Roger did not recall and said he may have swung first.

²⁷ It is noted that while each individual's version of the fight, if credited, is not necessarily outcome determinative, the testimony of the witnesses about the fight does have great impact in determining if Respondent violated the Act.

pertinent, that he did not use the language of billingsgate toward Diane Crawford but rather, in reply to a comment she made that he was stupid or something to that effect, he "told her to shut her mouth, that she did not know what she was talking about." Roger Crawford then said Mock could not address his wife in that manner, to which Mock replied he would talk to Diane Crawford in any way he wanted to; and Roger Crawford rejoined, "I'll knock the shit out of you." Mock said, "go ahead." Diane Crawford jumped in between them and said, "don't, Roger, he's not worth it." Roger Crawford pushed his wife out of the way, gave her his lunch bucket and, while Mock started to take his jacket off, Crawford said, "It looks like I'm going to have to knock the shit out of this guy." There was another short flurry of verbal contretemps, then Roger Crawford kicked and punched Mock, after which there was a fist fight. During the fight, Diane Crawford was assertedly urging Roger Crawford to hit Mock in the face.

Mock's version of the fight was substantially corroborated by Don Daves who stated that the only expletive used by Mock was when he told Diane Crawford, "You're a damn liar if you believe that." Daves also confirms that Roger Crawford tried to kick and hit Mock first after Roger Crawford said, in reply to the above-quoted comment that "I'll kick your ass if you talk to my wife like that."²⁸ Mickey Barnes' version of the incident also substantiates Mock's version of the events.²⁹ Mickey Barnes did not hear Mock swear at Diane Crawford or use any profanity. Matthew Barnes' testimony about the fight was also similar to Mock's testimony.³⁰ The observations of the other employees who were not even remotely shown to have been involved in the fracas also substantiate Mock's version of the event. Warren Van Loon, Jr., as he was leaving work, noticed a crowd gathering around Roger and Diane Crawford and Bob Mock. As he walked over the bridge, he was able to hear their conversation and observe the actions as follows:

They were engaged in a discussion as to whether or not Roger Crawford had been spying on the employees on behalf of the graveyard foreman. The exact words, I couldn't tell you. This was concern-

²⁸ Furthermore, Daves testified that he told Crawford, during a discussion which occurred when there was a break in the fight, that he saw Roger Crawford watching coworkers and heard him tell Blain that he was going to engage in such activity "right after lunch hour."

²⁹ Mickey Barnes testified that Roger Crawford and Mock were:

... just trying to talk. Then Diane butted in, and then Mock said just keep out of it, and then Roger got all mad and said he was going to whip his butt, and everything else. After that, Roger said well, I can take whatever you've got. I mean he couldn't really back down like that. Then Roger got mad and pushed Diane aside, took a swing, and then tried to kick at Mock. That's what I seen, anyway.

³⁰ Matt Barnes testified:

It started out Mock asking why he was doing these things which he was doing. It went back and forth, and Roger was more or less getting excited about it, and he was getting mad. I can't remember exactly what words were said. I don't know. Words just don't stick with me as a memory.

The fight started when Roger Crawford kicked at Bob Mock. He remembered Mock asking Diane Crawford to stay out of it. He asked her to stay out of it. When asked if Mock used profanity, the witness replied, "I think he said why don't you just stay the hell out of it."

ing Mickey Barnes who works on the graveyard shift. That's what the discussion was all about.

Q. Did you hear Bob Mock say anything to Diane Crawford?

A. No, I didn't.

Q. How did the actual fight start? What did you see as far as that was concerned?

A. There was a definite disagreement between the principal parties as to whether or not Roger had actually been spying on employees and reporting to the foreman. Bob claimed that he had, and Roger claimed that he hadn't, so they started calling each other liars. In the course of the conversation, voices raised and tempers flared. After they called each other liars and son-of-a-bitches for a while, pretty soon Roger threatened to kick his ass. Bob says well, come on. Roger didn't at that time, but shortly afterwards he made another threat, and Bob told him to come on and try it, so Roger handed his lunch bucket to his wife and asked her to step out of the way. She said no, Roger, it's not worth it, don't do it.

Then Roger just moved her back with his arm or pushed her out of the way. She already had his lunch bucket. He just pushed her back out of the way, and then they started fighting.

Q. Who threw the first punch or the first blow?

A. Roger did. He threw the first two. One was with his foot. He tried to kick him. The second one was a right cross which Bob sloughed off on his forearm. Then after that, Bob threw the next several, I think.

Respondent argues that Van Loon's testimony is not credible for he gave a statement on February 24, 1981, wherein he stated that, "I arrived on the scene just a few seconds before it came to blows." Respondent also argues that the offensive statements the Crawfords claim Mock made could have occurred prior to Van Loon's coming within earshot of the conversation. These arguments are not persuasive in discrediting Van Loon. When asked about the above-quoted February statement, Van Loon explained that the events occurred so quickly that it could have been just seconds after his arrival on the scene that the fight started but that he did hear the comments as he testified.³¹ Since Van Loon heard the subject matter of the dispute, which the Crawfords asserted occurred prior to the claim that Mock used very objectionable language to Diane Crawford which was said to have almost immediately precipitated the fist-cuffs, his arrival on the scene would have been in time to hear the alleged objectionable language. Van Loon is found to be credible, based on demeanor, candor, corroboration, clear recall, and, as noted above, the fact that

³¹ Respondent, to buttress its position, called Alvin Vann, a current employee, who said he could not see who struck the first blow, could not overhear the conversation and could identify only Roger Crawford as a participant. Vann described Daves as acting like a "bear dog" during the altercation but admitted that he had prior trouble with Daves. Daves had knocked him out during a dispute at work. Based on demeanor, bias, and lack of clear observation, it is found that Vann's testimony is not credible.

his testimony is adverse to his employer.³² Larry Rust testified similarly to Reeve, Van Loon, the Barnes brothers, and Mock. These witnesses' version of the fight is credited.

D. The Company's Investigation of the Fight

The guards Diane Crawford addressed telephoned the office and spoke to Toni Gates, a clerk at the Company, who then contacted Coomler and informed him of the fight. Gates then looked out a window and saw Bob Mock and Roger Crawford fighting. She could not tell if Daves was also involved. Coomler went toward the fight scene and, as he was approaching the bridge, the employees across the bridge scattered. He could only identify Matt Barnes as one of the departing employees. Coomler did not see anyone fighting. As Coomler was returning to the plant Bradley Allen, a current employee whose testimony is unrefuted, inquired what was going on; to which Coomler replied, "that it looked like a couple of guys threw a few swings at each other, but it didn't look like anybody had been hurt. So he [Coomler] just kind of shook his head and walked off. To me, it didn't really seem like he really knew what had happened out there yet . . . he [Coomler] didn't really look upset."

Coomler then went to the office and asked Toni Gates and another office worker, June Nabb,³³ to relate what they observed. Gates stated that Bob Mock and Roger Crawford were involved in a fight and she was not sure but possibly Daves was also involved. Gates does not recall if she told Coomler that Reeve observed the fight.³⁴ Coomler then called Hammond because he knew that fighting was a very serious offense, and "he had complete control of the plant for . . . a couple of months," so he wanted Hammond present because of his experience when he interviewed "the people." Coomler also told Blain to inform both Mock and Crawford that they were suspended until the incident had been investigated. It is unexplained why Daves, who may also have been a participant and had a reputation for being short-tempered and for fighting, was not similarly treated since Coomler admits that at that juncture he had only talked to the two office workers, one of whom indicated that Daves may also have been involved.

The Company, well prior to the fight, posted a notice entitled "General Rules of Conduct." The notice contains 19 listed prohibited practices, the breach of any being the "cause for disciplinary action, up to and including discharge."³⁵ There are no rules or other com-

pany policies prescribing a specific discipline program for any or all violations of these rules. However, as discussed below, Respondent contends that it is company policy to discharge all employees who participate in fights on company premises.³⁶

After talking to the two office workers and the guards,³⁷ Coomler and Hammond decided to interview Mock and the Crawfords the day after the fight. They were interviewed individually and separately. According to the Crawfords, they told Coomler and Hammond their versions of the events as ascribed to them hereinabove. Additionally, Diane Crawford, contrary to the representations of Coomler, also stated she told Coomler that Reeve, Van Loon, and Roger witnessed part if not all of the fight.³⁸ Diane Crawford's testimony on this point is credited.³⁹ Mock denied using extremely foul language toward Diane Crawford and further denied striking the first blow, indicating that he never intended the situation to devolve into a fight. Mock was discharged after this interview. According to Hammond, he was never confronted with Diane Crawford's allegation regarding his statements to her prior to the fight.

Also, the day after the fight, Larry Rust, a current employee, went to Coomler to talk to him about the altercation. Rust explained that the first thing he heard during the incident was someone saying, "I'll kick your goddamned ass." And at one point Diane Crawford said something like do not fight, and Roger pushed her aside.⁴⁰

Roger Crawford, prior to giving his statement to Coomler and Hammond, went to speak to Breeden at the Junction City mill the afternoon of the fight. Breeden did say he would make a phone call to Coomler. Roger Crawford further stated his wife told him that Coomler indicated that he had heard from Breeden. Breeden ad-

drugs; discrimination against or harassment of any individual or group of employees; quarrelsomeness or abusive language to any supervisor or to any employee; and instigating fighting on company property. These rules are posted on a bulletin board in the plant.

³⁶ It is undisputed the site of the fight between Mock and Crawford is located on company property.

³⁷ The guards did not testify, which is not a basis for applying the adverse inference rule. There is no indication that the guards saw the fight, identified the participants, or gave Respondent any information which influenced its decision to suspend Mock and Roger Crawford, and not discipline Daves or any other employee.

³⁸ Coomler denied knowing the names of disinterested or uninvolved witnesses. As indicated above, Gates was not sure she told Coomler that she noted Reeve witnessed the fight, but she was sure she told Coomler Daves may have been involved in the fight.

³⁹ This resolution is based on the criteria set forth in *Northridge Knitting Mills, supra*; *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950); and *Le Roy Fantasies*, 256 NLRB 211 (1981).

⁴⁰ Coomler claims Rust talked to him 2 or 3 days after the fight, which would be after Mock was discharged. Rust's testimony is credited based on demeanor and his status as a current employee. Coomler also stated that he considered Rust's statements corroborative of Diane Crawford's version of the event since it appeared Rust arrived on the scene after the asserted swearing by Mock at Diane Crawford occurred. Why Rust's statement that Roger Crawford struck the first blows was not considered as calling into question Diane Crawford's testimony is unexplained. Accordingly, this asserted reliance upon Rust's statement without any explanation as to when it occurred in relation to the other interviews and Mock's discharge and the apparent lack of consideration of the disparity in these versions of the events are inconsistencies which place into question Respondent's motives.

³² Another disinterested observer who substantiated Van Loon and the other witnesses was Daniel Reeve, who heard just a small portion of the conversation, that segment where Crawford said to Mock, "I'm going to kick your ass." Reeve also said Crawford struck the first blows. While Mock was in the process of taking off his coat, Crawford kicked and then hit him.

³³ Nabb did not appear and testify. This failure does not warrant the taking of an adverse inference.

³⁴ Subsequently, during the Company's investigation of this altercation, Diane Crawford told both Coomler and Hammond that Warren Van Loon, Jr., an individual whom she could identify only by his first name, Roger, and Reeve saw at least part of the fight.

³⁵ Some of the prohibited practices are smoking outside of designated areas; repeated tardiness; violation of safety rules or unsafe working habits; reporting to work while under the influence of intoxicants or

mitted that he told Crawford he would make a telephone call for him but denies having any input in the matter. Coomler also asserts that he was solely responsible for the decision to discharge Mock, Breeden had no input, and that he did not speak to Breeden prior to discharging Mock. Breeden further testified that he did inquire about the status of the investigation 3 or 4 days to a week after the incident as an aside to a business call and was told both employees were suspended at that time. Since Mock was discharged the day after the fight, this inconsistency, cojoined with demeanor and other testimonial inconsistencies, lead me not to credit Breeden's and Coomler's assertions, but rather to credit Diane Crawford's representation to her husband that Breeden did talk to Coomler and, hence, had input in the decision to fire Mock and suspend Crawford.

E. Discharge of Mock

According to Coomler and Hammond, they caucused after interviewing Mock⁴¹ and decided to reinterview the Crawfords to determine whether Mock's use of abusive language toward Roger Crawford's wife was sufficiently mitigating as to not warrant Roger Crawford's termination. It was also decided to discharge Mock then and there. Coomler states Mock was brought back into the office after a short wait in the anteroom after his interview, and was told he was discharged for these reasons: Instigating or initiating a fight, verbal abuse, and fighting. This decision was ostensibly made without interviewing the Barnes brothers or Daves since they were also waiting at the end of the bridge for the Crawfords and were considered to "have had a hand in the situation." Although asked, Coomler failed to explain why Diane Crawford, who was interviewed first, was not considered a similarly partial, hence unreliable, witness.

After reinterviewing the Crawfords, according to Coomler, he decided that Mock's statements to Diane created mitigating circumstances so Roger Crawford was only suspended for 3 weeks without pay. According to Coomler, that is the longest suspension imposed upon an employee. Previously, the longest suspension without pay was 1 week. It was admitted by Coomler that his opinion of Mock having a poor reputation for veracity, which was based on Mock's activities as a steward, was a consideration in who was believed and did play a role in the decision to discharge him and not to discharge Roger Crawford.⁴²

Mock disputes the Coomler and Hammond version of his discharge. Mock claims that at the end of his interview, without any hiatus for a caucus, Coomler:

... told me that they would check into it a little bit more, but as of that moment I was off the payroll. I said, but you are going to check into it some more? He said, yes, we're going to check into it some more; we might fire Roger, too, but you're not going to get your job back.

I said, Dick, there was all kinds of witnesses out there that saw what went on. They know exactly what went on all you have to do is to talk to those people who were out there and saw what went on, and you'll know what happened.

He said, well, we believe some of those people are going to side with you, but you're not going to get your job back. I said, you mean after you talk to those people and find out what the truth is, I don't get my job back? He said, that's right, you're not going to get your job back; we don't want you to get the wrong idea. I walked out the door.

Mock's version is credited based on demeanor, his demonstrated clarity of recall,⁴³ and inherent probabilities.⁴⁴ Mock filed a grievance over his discharge, which is not asserted to require deferral or otherwise influence this proceeding.

F. Company Policy

The General Counsel and the Charging Party dispute Respondent's claim that engaging in a fight on that segment of company property which was on the parking lot side of the bridge results in discharge, and such an offense was not exacerbated by the use of profanity toward a female member of the workforce.

According to Hammond, the decision to terminate Mock was influenced in his mind by previous problems the Company had involving discrimination against women. In 1977 Respondent was involved in an action, apparently brought by the Equal Employment Opportunity Commission⁴⁵ regarding the harassment of several female employees. This prior action, not involving Mock, made Hammond very sensitive to charges of harassment of female employees. Since Hammond also testified that he did not make the decision to terminate Mock, that Coomler made the decision, and Coomler, although present for all testimony, unlike most witnesses who were sequestered, did not similarly claim that the issue of harassment of Diane Crawford was comparably

⁴¹ The Crawfords were interviewed prior to Mock the day after the fight.

⁴² Both Hammond and Coomler testified that even if they did credit Mock's version of the incident, the fact that the fight occurred would have been sufficient to result in his termination. The only change in discipline believing Mock would occasion, according to Respondent, is that Crawford would also have been terminated. Also, Hammond testified that Johnson of the Union was contacted, informed of the Company's intentions, and reputedly agreed. Johnson did not appear and testify. At the time of the hearing as previously indicated, he was no longer president of the Union.

⁴³ Both Hammond and Coomler had difficulty clearly recalling the interviews. For example, Hammond admitted he was not totally clear what Diane Crawford told them was the substance of the dispute between her husband and Mock, and Coomler's failure to recall that Diane Crawford and possibly Toni Gates told him Reeve was present and saw at least a portion of the fight.

⁴⁴ Both Hammond and Coomler testified that Mock's fighting was, according to company policy, an automatic basis for discharge and there were no mitigating circumstances warranting nonapplication of this policy. As described below, not all employees who engaged in fights were discharged because of the absence of mitigating circumstances. Furthermore, the failure to consider the fact that Roger Crawford's initiation of the fistcuffs as mitigation in the event Mock's version was believed renders this testimony not credible.

⁴⁵ The witnesses for the Company were unclear regarding the government agency involved in the 1977 "harassment of female employees" action.

viewed as outcome determinative in the decision to discharge Mock, although he testified that the harassment was considered, "fighting alone would have led to his discharge." Also, if such conduct were considered so abhorrent, why did Respondent admit that harassment of other employees had never resulted in discharge, just several final warnings. Also, if such conduct were not tolerated, why was not Daves, who Diane Crawford said threatened her during the same incident,⁴⁶ subjected to any discipline, particularly in view of the fact that Daves had previously received a warning from the Company for harassing female employees.

According to Diane Crawford, profane language is not heard in the plant on a regular basis; she has heard objectionable language approximately four times in the 5 years she has been an employee of the Company. She asserts that she does not personally use obloquy. Roger Crawford testified that the language of billingsgate is used in the mill in the regular course of business, but with less frequency since women had begun working alongside the men pursuant to a rule which went into effect around 1977. He said his wife complained to him a couple of times about the language used in the mill, which tends to belie her claim of the rare incidence of abusive language usage by coworkers of less than once a year.

Mock testified, without refutation and in corroboration of Roger Crawford's assertions, that profanity was frequently used at the plant, both in jest and in anger. He also stated that he never heard of anyone being disciplined solely for the use of profanity but he believed Blain may have received a verbal warning about "calling people dummies and dumb shits and whatnot." Mock and Roger Crawford's testimony was corroborated by Jeffrey Millbrandt⁴⁷ and Van Loon.⁴⁸ This admission against interest by Crawford, the lack of clear refutation by the Company, and the forthright manner of Van Loon, Mock, and Millbrandt lead me to credit their assertions that the language of billingsgate is commonly used at the plant. Further, the Company has not established a clear policy prohibiting the use of the language of billingsgate or that the Company has an established standard for disciplining employees for using vulgar language.

The Charging Party and the General Counsel also contend that, contrary to Respondent's assertion, the Company does not have an established policy which generally requires the discharge of participants in fights occurring anywhere on company property. As previously indicated, the posted company rules do not prescribe the severity of the discipline for any particular infraction of the listed tenets.

Breeden, Coomler, Hammond, Trader, Langham, and Blain's assertions that fighting anywhere on company property is contrary to company policy which, absent

mitigating circumstances, routinely requires discharge, is not credited. As admitted by Wendell Langham,⁴⁹ he had heard possibly years before Mock's discharge, that if employees had any dispute, they were to "take it over the bridge";⁵⁰ that this was common knowledge; but he could not recall if he heard supervisors tell employees to take their disputes "over the bridge."⁵¹

Larry Bowman, an employee of the Company for over 14 years, credibly testified that he was told by both Coomler and Fred Smith, a past foreman, "that if you've got a problem with somebody and it's going to get into a fighting match, you take it across the bridge." Thomas Potter,⁵² who has previously been found to be a credible witness, testified that Breeden, in the presence of Hammond and Coomler as well as other officials from the Company, told several stewards that "if we had any problems, to take them across the bridge, and he was referring to something that would come down to a fight or that type of activity . . . if you've got that kind of a problem, he said, settle it across the bridge. He said, don't settle it in the plant, take it across the bridge."⁵³ Matt Barnes testified that he heard from former employees that Breeden told them to take their personal disputes "over the bridge," he never heard that directive from any supervisor, but it was a matter of general knowledge.

Accordingly, it is found that company policy did not clearly and inexorably require termination of Mock, absent mitigating circumstances, for fighting on company property "across the bridge." Mock did not raise this point during his interview with Coomler. Therefore, assuming that Coomler properly interpreted the company policy that personal disputes occurring anywhere on company property were subject to discipline, the historical application of such policy by Respondent will be examined. Respondent placed in evidence nine documents regarding disciplinary actions taken by the Company since the early 1970's. The first two documents involved the discharges of Richard A. Wymer and Stephen Cooper by Breeden. The Wymer discharge reads: "Fighting on job. Would not rehire, good man but has temper problem." The Cooper discharge form states: "Fighting on job, work fair only—Would not re-hire."

⁴⁹ Langham is an admitted supervisor who has worked for the Company about 19 years and has been a supervisor about 14 years.

⁵⁰ The bridge referred to in this phrase is the bridge over the river running through the plant property as described above.

⁵¹ Coomler and Breeden claim Breeden used the phrase "across the bridge" to mean going home. Specifically, Breeden claims the phrase was used during some grievance meetings concerning temporary job transfers and he assertedly told the steward that, if the complaining employees refused to accept the temporary job assignment when they crossed the bridge and left the premises, they were discharged. Based on demeanor, inherent probabilities, Langham's admission, the clear refutations by employees against their interests, the lack of specificity as to when these grievance meetings were to have occurred or who was involved, and for other reasons stated in this decision, this explanation is not credited.

⁵² Ourada corroborated Potter's testimony that Breeden made this statement in the presence of Coomler and Hammond.

⁵³ Potter further credibly testified that he brought up this statement at a grievance meeting in reference to Mock's discharge and "Dick Coomler told me that Heavy Breeden had said that, but his idea was right but his terminology was wrong." As previously indicated, Coomler's general denial of this allegation is not credited.

⁴⁶ As previously indicated, Daves assertedly told Diane Crawford she had better shut her mouth or she was going to get it too.

⁴⁷ Millbrandt stated he hears swearing at the mill all the time, on a regular basis, in the presence of supervisors.

⁴⁸ Van Loon stated that in addition to hearing people swearing while working "hundreds of times a day," he has heard Diane Crawford swear, primarily when telling jokes.

Breeden stated he put down these comments as reflecting his "discharge decision." According to Breeden, while inside the plant "around the spreader crew," these two employees exchanged "some words . . . Wymer socked Cooper and down he went and that was the extent of it. Both were discharged." Breeden further testified that over the years he had heard of a couple of fights in the parking lot but no disciplinary action was taken since he learned about the incident 3 or 4 days after it occurred and because there were "no complaints or no problems." This response indicates that the company policy was predicated upon "complaints or problems" arising from the fight rather than the activity itself. It is also noted that Cooper did not strike Wymer but this was not considered a mitigating factor, under the existing circumstances, thus indicating that the participants' work records or temper problems were considered in the decision to terminate these individuals.

The statements of Harry Wilson and related exhibits are further testament to the above finding that an employee's work history, including propensity to engage in fights, and work habits are considered in determining if employees who fight on company property are discharged. Wilson discharged two employees for fights, Kelly M. Davis and Mike Boag. On Davis' termination of employment report, it was noted that he previously received a verbal warning that he "is an instigator of trouble. Does not do anything he does not have to. Does not work well with other employees. Was seen fighting on greenchain." Boag's termination of employment report noted that he had also received prior verbal warnings and stated, "Mike had gotten in a fight a few months back and was told that if it had happened again he would be fired. Mike has a very bad temper which he can't control. He got in another fight 8-16-78⁵⁴ and I was forced to terminate him." Wilson tried unconvincingly, lacking candor, contextual consistency, and clarity, to explain the notation away by claiming that the reference to a prior fight was a misnomer, rather it was a verbal altercation, that no blows were struck. Subsequently Wilson admitted that Boag struck an employee named Ron Lowe as discussed below. This explanation is deemed inadequate and unconvincing. These termination notices clearly demonstrate that fighting was not the sole consideration in the decision to terminate employment; rather, prior problems and work history were included in the decision.⁵⁵

Wilson further testified about an incident involving Boag, that the other employee, Lowe, was also given a verbal warning, that Boag hit Lowe and Lowe did not reciprocate. Lowe was also slapped and pushed by an employee named Kelly at another time; since Lowe did not fight back, since he was not the instigator, he was only warned and not disciplined, contrary to Breeden's handling of the Wymer-Cooper incident. There was a

similar incident which involved Millbrandt and a former employee known as "Metco." Millbrandt, whose testimony is credited,⁵⁶ stated that "around 1980" a coworker nicknamed "Metco" got mad at him, came around the machine they were working on, approached him with clenched and raised fists and tried to punch Millbrandt. Since Millbrandt was bigger than "Metco," he was able to fend him off and did not strike back. Two supervisors were present, Trader and Blain. The supervisors let the altercation go on for about 5 minutes and then separated the participants. Neither "Metco" nor Millbrandt were disciplined for the incident. According to Blain, it was not a fight,⁵⁷ "they were pushing at each other." There was no showing that the "company policy" uses the term "solely" in a limited sense; i.e., pushing does not count, only a specific action such as the throwing of punches. Also punches were thrown by "Metco." Millbrandt was told by Trader a year later that he would have fired "Metco" but that it was not his shift, it was Blain's shift.⁵⁸ Millbrandt also discussed another fight he had on company property with a coworker named Mike Vaughn. Prior to the fight, "there was screaming back and forth" between Millbrandt and Vaughn in the presence of Blain. Blain did not intervene or subsequently discuss the matter with them or discipline the employees for the incident. Vaughn and Millbrandt agreed in Blain's presence to subsequently meet in the parking lot after work. They did so meet but did not engage in fistcuffs. These employees were not warned or disciplined by Respondent regarding this incident.⁵⁹

Another incident involved a dispute between James Stout and Ervin Cogburn⁶⁰ which occurred around the end of 1980. According to Stout, a current employee of the Company, Cogburn was a temporary supervisor who, at the end of the shift, requested that Stout perform duties that Stout said were not his responsibility. Cogburn then asked another employee who also refused the

⁵⁶ Millbrandt, a current employee, testified candidly, displaying a clear recollection of the events. Also, Mock's testimony corroborates Millbrandt's version of the incident.

⁵⁷ Webster's New Collegiate Dictionary, G. & C. Merriam Company, Springfield, Massachusetts, 1977, defines the term "fight" as follows:

1 a: to contend in battle or physical combat; esp: to strive to overcome a person by blows or weapons. b: to engage in boxing. 2: to put forth a determined effort.

vt. 1 a (1): to contend against in or as if in battle or physical combat (2): to box against in the ring b(1): to attempt to prevent the success of effectiveness of (the company *fought* the strike for months) (2): to oppose the passage or development of (a bad habit) 2 a: to carry on: WAGE b: to take part in (as a boxing match) 3: to struggle to endure or surmount (out a storm at sea) 4 a: to gain by struggle (s his way through) b: to resolve by struggle (*fought* out their differences in court) 5 a: to manage (a ship) in a battle or storm. b: to cause to struggle or contend. c: to manage in an unnecessarily rough or awkward manner—*fight shy of*. to avoid facing or meeting.

fight n(oun) 1 a: a hostile encounter: **BATTLE COMBAT** b: a boxing match c: a verbal disagreement: **ARGUMENT** 2: a struggle for disposition for fighting: **PUGNACITY** (still full of).

⁵⁸ Trader's statement that he never saw a fight on plant premises is not credited based on demeanor and the lack of spontaneity in his testimony which was bereft of clarity of recall and candor.

⁵⁹ Mock saw Vaughn kick coworker Bowman in the buttocks but there was no showing Respondent had knowledge of the incident, hence it will not be considered herein.

⁶⁰ Cogburn did not appear and testify. Since there is no assertion he was a supervisor, no adverse inference will be drawn from this failure.

⁵⁴ The date of his termination.

⁵⁵ Similarly the company reports given Jeff Nowak and Brian Cushwa substantiate this finding. Nowak was discharged for he had been previously terminated for fighting, as noted on Cushwa's report, and Cushwa was only given a 3-day suspension and a warning after the "minor physical exchange and verbal abuse," but that future violations would result in termination.

request. Cogburn became angry and started yelling and screaming at the two employees. Stout "told him where he could put it and headed out the door." Stout was 10 or 15 feet from the exit, alongside the building, when Cogburn grabbed him from behind, spun him around, and threw him alongside the building. Stout escaped Cogburn's grasp and went back into the building where he met his foreman, Wendell Langham, at the door. Stout yelled at Langham, telling him to "get that clown, Cogburn, off of him."

Langham asserts that, as he was exiting the plant, he saw Stout leaning up against the wall and Ervin Cogburn had his hands on Stout. When Langham looked at them, Cogburn let Stout go, explaining that Stout refused to perform the requested tasks and cursed at him. Langham told Cogburn that that task was not Stout's job. The incident was reported to Coomler and Stout was given a warning for cursing at Cogburn. Langham also stated that he had heard Cogburn received a written warning from his supervisor, Al Barber. Barber did not testify and no explanation was proffered for his absence or the absence of the asserted warning⁶¹ warranting the finding that no written warning was immediately or timely issued to Cogburn regarding this incident. Stout filed a grievance over the matter. Langham claimed the incident was not a fight; rather, he described it as an argument. Coomler testified that Cogburn did get angry at Stout after Stout cursed at him and did push Stout up against the wall. According to Potter's undisputed testimony, the first-step grievance meeting occurred just prior to the hearing herein, approximately 1 year after the incident, and the Company gave Cogburn a warning. Coomler admitted that only a verbal warning was given Cogburn until after Stout filed a grievance. The recently issued written warning read: "Ervin Cogburn came to me and said that Jim Stout had cussed him. Ervin followed out after Jim and after Jim got outside the door he told him that if he ever cussed him again that he would kick Jim's butt or something similar. I [Coomler] told Ervin that if he ever struck anyone on company property, he would be terminated." The Company never clearly established that the company rule applied differently to shoving employees against the walls than in incidents where the physical contact is a blow struck with a fist. If this is Respondent's contention, it is found to be unsupported and without merit.

Coomler recalled another incident involving employees Chuning and Chapman.⁶² Chapman claimed Chuning hit him. Coomler asked the foreman, Langham, what occurred and Langham reportedly replied that he asked the employees working near the alleged incident and they all said they did not see anything, "they saw no blows." Chuning denied laying a hand on Chapman. Coomler

⁶¹ Blain testified, without controversion or modification, that the Company should have copies of written warnings; this requires application of the adverse inference rule since there was no showing that Barber gave Cogburn a verbal warning. See *Auto Workers v. NLRB*, 459 F.2d 1329 (1977), and *Northern Packing Co. v. Page*, 274 U.S. 65 (1938). It appears that only after the first meeting regarding the grievance Stout filed over the incident was Cogburn given a written notice. The warning is undated.

⁶² Neither of these employees testified.

stated that since he had no witnesses to the fight, he gave Chuning a 2- or 3-day suspension.

The La Blue grievance referred to above involved alleged misconduct. La Blue, who assertedly worked on one side of the "dryer," ran around to another side and aimed a jet of water from a water hose at another employee. Coomler questioned the employees present during the incident. The grievance arising therefrom caused Coomler, he asserts, to doubt Mock's propensity for veracity. Mock's undisputed testimony is that many factors of La Blue's work history were investigated prior to his discharge, and that his grievance was settled by La Blue being given a job by the Company at Coburg Veneer after exhaustively lengthy investigation and completion of all three steps of the grievance procedure.

Based upon the foregoing, it is concluded that Respondent has not shown that there is an established company policy which requires, absent unusual circumstances, discharge of an employee for engaging in a fight. The Company's policy does not state that discharge will be the penalty for initial infractions of any or all of the listed rules. Further, there is no showing that discharge is required if more than any one rule is broken simultaneously or sequentially. In fact, all the discharges and other disciplinary notices placed in evidence clearly demonstrate that the employee's entire work history is considered, and either the fight was a second infraction,⁶³ or the individual had a poor attitude or work record.⁶⁴ Those employees who received warnings for first infractions without any other preexisting problems were not discharged.⁶⁵ Finally "Metco," who took a swing at Millbrandt and, unquestionably, physically assaulted him, albeit the blows were successfully fended off, was not disciplined at all. It is noted that these incidents occurred inside or next to the plant. No distinction was made as to length of the fight. Respondent did not contend that either Crawford or Mock was injured during the fracas which might have served as a distinguishing element in their treatment of the employees. In sum, it is found that company policy as shown on the record did not require Mock's discharge absent mitigating circumstances.

⁶³ Mike Boag had gotten in a fight a few months back, "has a very bad temper which he can't control." Jeff Nowak was harassing and antagonizing a fellow employee. He was warned of this when relieved because of being previously terminated for the same reason.

⁶⁴ Stephen G. Cooper (fighting on job, work fair only, would not rehire), Wymer (fighting on job, would not rehire, good man but has temper problems), Kelly M. Davis (an instigator of trouble. Does not do anything he thinks he does not have to, does not work well with other employees, was seen fighting on greenchain).

⁶⁵ Brian Cushwa was suspended for "conflict [with Nowak] which led to minor physical exchange and verbal abuse. Employee warned we would not tolerate any violence of this nature. Any future violation will result in termination. Cogburn threatened and pushed Stout and received a verbal warning which was subsequently reduced to writing only after a first-step grievance meeting long after the incident occurred. Daves also similarly threatened both Crawfords during the fight, had a reputation for fighting and has previously been disciplined for harassing a female employee, but was not disciplined at all for the Crawford incident. Stout received a verbal then written warning that "it would cost him his job" if he used "abusive language" against anyone else.

G. Alleged Unlawful Threat by Blain

Larry Bowman, who has previously been found to be a credible witness based on demeanor, his status as a current employee, clarity of recall, candor, and inherent probabilities, testified that he had a conversation with Blain, an admitted supervisor, about Mock's discharge around the end of July 1981. Bowman stated:

Well, I don't remember what all started the conversation, but it had to do with I was agreeing with Bob Mock on the [Mock] discharge, and he [Blain] told me at that time that he thought that Bob Mock was asking for some sort of discipline because he'd been warned, by himself and by Jim Tobin—another worker up there—that if he didn't stop going around getting everybody all stirred up, that Dick Coomler and Heavy Breeden was going to be after him. . . .

He [Blain] said that Bob was going around getting [sic] stirred up and trying to get them to file grievances.⁶⁶

Further supporting this finding that Blain made the statement is the previously credited testimony of Millbrandt that Trader had stated to him that "Dick [Coomler] was out to get Bob [Mock] because of his involvement with the union."

H. Alleged Unlawful Interrogation of Potter

Potter had a discussion during and at work with his supervisor, Frank Trader,⁶⁷ about the statement he had given to the investigator from the National Labor Relations Board. Potter testified as follows:

He [Trader] was curious as to what was said, if I had talked to an investigator or not. He related that he had talked to—or he had figured on talking to an investigator, and he wanted to know what I had told the investigator—you know, if I'd been locked in a conversation with him—so that he would know what to tell the investigator to kind of align our stories. . . .

At that time, I don't believe I had talked to an investigator, and I told him that I would tell the truth, that that was the policy that we'd always went by as a union member and a shop steward, and that that wasn't going to change, as far as I was concerned.

Trader's version of the conversation is that Potter approached him and said something to the effect that Mock was going to win the case. He could not exactly recall the conversation. Trader denied asking Potter about his testimony or commenting that they should compare their statements. Potter's version of the conver-

⁶⁶ Blain disclaimed making the statement to Bowman, stating he could not recall such a discussion. This disclaimer is not credited. Blain did admit that Breeden and Coomler were unhappy with Mock for "soliciting grievances." There was no showing that there was a company rule prohibiting or limiting Mock's activities. This admission by Blain is consistent with the statements Bowman attributes to him.

⁶⁷ It is not disputed that Trader is a supervisor.

sation is credited based on demeanor, his status as a current employee, and inherent probabilities.

IV. ANALYSIS AND CONCLUSIONS

Section 8(a)(1) of the Act prohibits an employer from interfering with, threatening, or coercing employees in the exercise of their Section 7 rights to support or oppose a labor organization, or to engage in or refrain from engaging in concerted activity. This prohibition is tempered by the provisions of Section 8(c) of the Act, which states:

Expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-619, balances the requirements of the two above-stated sections of the Act as follows:

Any assessment of the precise scope of employer expression, of course, must be made in a context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

As indicated, Bowman's testimony that Blain told him Mock was discharged because he was getting the other employees "stirred up and trying to get them to file grievances" is credited. This statement is found to violate the Act for there was no showing that the Company engaged in any acts or made any statements which neutralized the coercive effect of this conduct. The consequent tendency of the employee, who was a member of the unit, to believe that the statement resulted from the special knowledge of an acknowledged supervisor of the basis for Mock's discharge, true or not, violates the Act by impliedly threatening other unit members that they could meet the same fate if they engaged in the protected activity of filing grievances. See *Kranco, Inc.*, 228 NLRB 319 (1977), *enfd.* 572 F.2d 318 (5th Cir. 1978); *Hit 'N Run Food Stores*, 231 NLRB 660, 662 (1977); *North State Supply Co.*, 247 NLRB 1331 (1980), *Truck Stations, Inc.*, 258 NLRB 705 (1981), and *A & B Janitorial Service*, 253 NLRB 508 (1980).⁶⁸

⁶⁸ The basis for this finding was clearly stated in the administrative law judge's decision, *supra* at 519, as follows:

It is manifestly coercive within the prohibition of Section 8(a)(1) for an employer to inform employees that they and/or other employ-

Continued

Also as found above, an admitted supervisor, whose actions were not disavowed or neutralized by the Company, quizzed an employee about his statements given to an investigator for the Board. Such inquiry was not shown to have stemmed from an attempt by Respondent to elicit information necessary in preparation for trial or for other legitimate purposes nor was it done in a manner comporting with the criteria set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964).⁶⁹

An inquiry into whether an employee talked to an investigator from the Board and the content of that employee's statement to the Board representative is unlawful interrogation for:

As such these statements necessarily reveal the employee's attitudes, activities and sympathies Moreover, the statements divulge the union sympathies and activities of other employees and the conduct of the supervisors to the union and its adherents. As such, they should be free of any inquisitive interest by the employer as are the employee's union activities themselves. Knowledge by the employee that his employer is manifesting an interest in what the employee may say about him can only exert an inhibiting effect on the employee's willingness to give a statement at all or to describe all of the matters of which he has knowledge for fear of saying something that may incur the employer's displeasure and possible reprisal. [*Winn-Dixie Stores*, 143 NLRB 848, 849.]

Accordingly, it is found that Supervisor Blain's quizzing of Potter regarding his statement to an investigator for the Board constitutes interference, restraint, and coercion within the meaning of Section 8(d)(1) of the Act.⁷⁰

The General Counsel and the Charging Party contend that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging and refusing to reinstate Mock because of his union activity, a charge that Respondent denies. The provisions of Section 8(a)(1) were previously stated. Section 8(a)(3) provides, as here pertinent:

It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

ees have been discharged for engaging in union activities, since such statements necessarily constitute a threat that other employees will meet the same fate if they support the union.

⁶⁹ That the statement was voluntary and that no reprisals would be taken against them if he refused to answer the questions. These protections are to be accorded "irrespective of the employer's intent to coerce, the extent of the questioning or the number of employees so interrogated, or the remoteness of the interrogation to the alleged unlawful conduct." *Kyle & Stephen*, 259 NLRB 731 (1981).

⁷⁰ Cf. *Texas Industries*, 139 NLRB 365 (1962); *Hilton Credit Corp.*, 137 NLRB 56 (1962); *W.T. Grant Co.*, 144 NLRB 1179 (1963); *Braswell Motor Freight Lines*, 156 NLRB 671 (1966); *Waggoner Corp.*, 162 NLRB 1161 (1966); *Dan Carter Co.*, 168 NLRB 314 (1967); *John Oster Mfg.*, 173 NLRB 503 (1968), and *Scotto's I.G.A.*, 249 NLRB 909, 913 (1980).

The issue in this case is the employer's true motive.⁷¹ Unless Respondent was motivated by reasons illegal under the Act, it is entitled to discipline employees for whatever reason or lack thereof it chooses. *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 190 (3d Cir. 1943), cert. denied 32 U.S. 778 (1943). The Board, in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), requires, in "dual motivation" cases, that the General Counsel make a *prima facie* showing that protected conduct was "a motivating factor" in the employer's decision to initiate the action in question.⁷² Once such a showing is made, the employer assumes the burden of demonstrating that it would have taken the same action even in the absence of the protected conduct. Further, if it is shown that the grounds advanced by the employer were pretexts, it necessarily follows that the employer has not met this burden under *Wright Line*. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *NLRB v. Nevis Industries*, 647 F.2d 905, 909 (9th Cir. 1981).

In determining motive, as noted by the court in *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969), the Board must make "one of fact—what was the actual motive of the discharge?"

"It is particularly within the purview of the Board to determine . . . on conflicting evidence what the motivation for discharge was." *Golden Day Schools, Inc. v. N.L.R.B.*, 644 F.2d 834, 838 (9th Cir. 1981), quoting from *N.L.R.B. v. Winkel Motors, Inc.*, 443 F.2d 38, 40 (9th Cir. 1971). "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving." *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). Accordingly, the Board's determination of the actual motive for discharge "may, and usually must, be based upon circumstantial evidence." *Golden Day Schools, Inc. v. N.L.R.B.*, 644 F.2d at 838. Accord: *N.L.R.B. v. V & W Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978); *Polynesian Cultural Center v. N.L.R.B.*, 582 F.2d 467, 473 (9th Cir. 1978). Thus, as the Ninth Circuit recently reiterated [*Golden Day Schools, Inc. v. N.L.R.B.*, 644 F.2d at 838]:

Self-serving declarations by [the company's] management personnel regarding their motivation are not conclusive. Indeed, when the Board determines, as it did here, that such declarations are untrue, the false assertions of lawful purpose support the inference that the declarants' motive was unlawful.

See *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d at 470. Accord: *Folkins v. N.L.R.B.*, 500 F.2d 52, 53 (9th Cir. 1974); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 660 F.2d 1335, 1340 (9th Cir. 1981).

The General Counsel made a showing sufficient to support the inference that Mock's protected conduct was

⁷¹ There is no question that Respondent knew of Mock's activities as a steward.

⁷² Cf. *St. Joseph Hospital Corp.*, 260 NLRB 691 (1982).

"a motivating factor" in the Employer's decision to terminate him. The previously credited evidence establishes that Coomler and Breeden were unhappy with his protected activity of filing a grievance about the proposed layoff of the graveyard shift.⁷³ Mock was considered a fine employee, supervisory material, prior to becoming a union steward. After becoming an assertive advocate of employee rights as a steward, the number of grievances filed by employees increased markedly. This led to allegations by Respondent that Mock was soliciting grievances which, if true, was not shown to be against any established Company rule or practice or to be otherwise improper. After reviewing Mock's grievances, the Union found them to be soundly couched, not frivolous or improper. Mock experienced increased difficulties in bidding on jobs. Shortly before his discharge, Mock was given reason to fear that his activities as a union steward jeopardized his continued employment at the Company and it was determined that he should "lay low—cool it." He was told to leave the mill after his shift, which was not shown to be a standard operating practice or particularly justified in Mock's case. Also, Coomler admitted that he had a poor opinion of Mock's reputation for truthfulness because of his activities as a union steward, particularly in pursuing La Blue's grievance, although he never confronted Mock with this allegation. Respondent's attitude could not be characterized as sympathetic toward Mock's contract enforcement activities and his attitude as steward for he was accused of being a troublemaker and soliciting grievances. Respondent's disdain for Mock was illustrated by Coomler's admitted practice of trying to avoid using him as a steward, such as using Ourada in the Mickey Barnes probation meeting even though Ourada did not work the same shift as Barnes and had to seek Mock's assistance in the matter.

Another indication of Respondent's changed attitude regarding Mock was the incident testified to by Stout where he came up to Mock to ask questions regarding funeral leave and Breeden told Mock if he did not have anything better to do he should get in the back room and straighten it up. Breeden, about an hour later, told Stout that Breeden had nothing against Stout, "that he had just had it with that trouble-making Mock and he just couldn't handle it anymore."⁷⁴

In its defense, Respondent advances a legitimate business reason for the discharge. However, the circumstances of this case, where Respondent clearly demonstrated resentment over Mock's assertive advocacy of employee claims and subjected him to disparate treat-

ment, clearly evidence that Mock was discharged for reasons proscribed by the Act. As found above, Mock was the only employee disciplined for infractions of the rules, including the rule against fighting, when it was his first offense and he was otherwise considered a good worker. *M K Laboratories*, 261 NLRB 152 (1982). Discharge was not automatically imposed in each case involving physical violence, even when that violence occurred within or abutting the plant, unlike the Mock-Crawford fight. Hence, even assuming *arguendo* that Respondent did not have a policy permitting employees to resolve disputes "over the bridge," its rules did not automatically require discharge absent mitigating circumstances. The asserted threats Mock made were similar to Diane Crawford's assertions regarding Daves' statements, yet this allegation was not investigated nor was any discipline imposed, even though Daves had previously been warned about such conduct and had a reputation for having a bad temper. While fighting on the Company's premises would reasonably be considered as rendering employees unfit for further service, Respondent has not similarly deemed other combatants unfit for further service, and it is found herein that Mock's concerted activities were a motivating factor in Respondent's decision to discharge him.

Further, unlike any of the other disciplinary actions of record, Respondent suspended Mock and Crawford prior to investigating this incident. Variance by the Employer from normal business practices further supports an inference of unlawful motivation. *McGraw-Edison Co.*, 172 NLRB 1604 (1968), *enfd.* 419 F.2d 67 (8th Cir. 1969). Also, the investigation differed from those discussed in the record in that most of the witnesses, whether ostensibly involved or not, were not interviewed, even though Respondent knew that they witnessed the incident, as Diane Crawford's testimony credibly demonstrated. Other indicia of disparate treatment include the failure to investigate the alleged improprieties by Daves,⁷⁵ the fact that Mock was terminated immediately after his interview, unlike Crawford, and he would have been terminated, according to Coomler, even if his version of the fight was believed. That Mock's asserted use of profanity toward Diane Crawford was considered a mitigating circumstance for Roger Crawford while being kicked and punched by Roger Crawford would not be similarly regarded is a distinction unexplained on this record. This obviously disparate treatment is indicative of lawful motive. *M K Laboratories, supra*. The failure to fully investigate the incident, Respondent asserts, led to the failure to verify the Crawford's assertions that Mock cursed at Diane Crawford. Diane Crawford's allegation is found to be untrue. As held in *Bechtel Corp.*, 195 NLRB 1013 at 1020, the Board is not concerned most with whether the Crawfords' assertions were meritorious but whether this allegation was, in fact, a motivating cause of the conduct of Respondent, resulting in Mock's discharge. The fact that Respondent engaged in no verification, engaged in an uncharacteristically cursory investigation,

⁷³ Employees, under Sec. 7 of the Act, have a protected right to file and process grievances. *Thor Power Tool Co.*, 148 NLRB 1339, *enfd.* 351 F.2d 584 (3d Cir. 1965); *Top Notch Mfg. Co.*, 145 NLRB 429; *Caterpillar Tractor Co.*, 242 NLRB 523 (1979).

⁷⁴ Breeden's reference to Mock as a "trouble-maker" has "an established meaning" in the annals of labor relations. It is a term applied by employers to individuals who are attempting to elicit other employees into engaging in union or concerted activity. *C-E Cast Equipment*, 260 NLRB 520 citing *Garrison Valley Center*, 246 NLRB 700 (1979); *Passaic Crushed Stone Co.*, 206 NLRB 81, 85 (1973). That Breeden no longer worked at Culp Creek does not abrogate or mitigate the impact of this finding for, as Roger Crawford credibly stated, Breeden did talk to Coomler about the incident, as he represented he would, and it is concluded that his attitude is representative of Respondent's motives and that his input was efficacious in the outcome.

⁷⁵ Including his potential involvement, and the assertion he told Diane Crawford "that she had better shut her mouth or she was going to get it too."

and had no independent support for its decision, yet fired Mock, further demonstrates disparity of treatment indicative of unlawful motive.⁷⁶ It is also noted that Respondent admitted that Mock would have been discharged even if he had not cursed at Diane Crawford.

As noted hereinbefore, Respondent failed to show that the company rules clearly require, absent mitigating circumstances, discharge for fighting on company property rather than any or no discipline. The list of prohibited practices, such as "smoking outside of designated areas," was not shown to be subject to a specified disciplinary program. Further, the record clearly demonstrates that the nature of the discipline imposed is highly discretionary, as reflected by the disparate treatment of the fight participants. Also, it was not shown that any scale or program of disciplinary actions to be taken against rule violators existed and, if a system of progressive or formulated discipline existed, that employees knew that there was such a program. Respondent also failed to show that the Crawford-Mock fight was so dissimilar from the other physical altercations detailed in the record as to warrant the disparity in treatment, such as Cogburn getting only a verbal warning after Stout filed a grievance over Cogburn shoving him against the wall or the 5-minute fracas where "Metco" attacked and attempted reputedly to punch Millbrandt. Also relevant in determining motivation is the Employer's use of a multiplicity of alleged reasons for its decision, which is a familiar signpost to discriminatory intent. See *La-Z-Boy Tennessee*, 233 NLRB 1255 (1977); *NLRB v. Superior Sales*, 366 F.2d 229 (8th Cir. 1968). Based on the contradictory evidence and the disparity of treatment of the different violators of the company rules, it is found that the company rules do not require automatic discharge for fighting absent extenuating circumstances, and that the Company falsely interpreted and imposed the rule in an attempt to conceal its actual motive in discharging an extremely active and effective union steward. See *L. D. Brinkman Southeast*, 261 NLRB 204 (1982).

In conclusion, it is found that Respondent, through the inconsistent application of its vague and imprecise rule against fighting, by discharging its most active job steward while not similarly treating other employees engaged in similar conduct, advanced reasons for the discharges that were pretexts and, if the case is considered under *Wright Line*, *supra*, the counsel for the General Counsel made a *prima facie* showing that Mock's protected conduct was a "motivating factor" in Respondent's decision to discharge Mock and Respondent has failed to demonstrate that the same action would have been taken against Mock save for his protected conduct. Supporting this conclusion are Breeden's comment that Mock was a troublemaker and Trader's statement to Millbrandt that Coomler "was out to get Bob [Mock] because of his involvement with the union." The decision by Mock, Crawford, Potter, and others that he had to "lay low" because Respondent might fire him because of his union

activities is evidence indicative that Respondent had planned to terminate Mock prior to the fight. In further support of this conclusion is the statement of Blain to Bowman admitting the discharge of Mock was indeed in retaliation for his aggressive conduct as a steward. This admission eliminates all questions regarding the basis for Mock's discharge. *Advanced Installations*, 257 NLRB 845 (1981), and cases cited therein. Therefore, it is found that Mock's discharge was for a discriminatory reason and violates Section 8(a)(3) of the Act.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, Bohemia Inc., as set forth in sections III and IV above, occurring in connection with Respondent's operations described in section I above, have a substantial and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Bohemia, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Woodworkers of America, Local Union No. 3-246, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by (1) threatening employees through indicating that employees have been terminated or otherwise discriminated against because of their union activity and (2) coercing and threatening and questioning employees regarding statements, affidavits, or depositions they may have given to an official investigator of the National Labor Relations Board.
4. Respondent has violated Section 8(a)(3) and (1) of the Act by its discriminatory discharge of Robert D. Mock.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Accordingly, the Respondent shall be ordered to immediately reinstate Robert D. Mock to his former job or, if that job no longer exists, then to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings and compensation he may have suffered because of this illegal discrimination against him in his employment as herein found. Backpay shall be computed with the formula and method prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest per annum computed in the manner prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁷⁷

⁷⁶ It is noted that in the Chuning-Chapman incident detailed above, Coomler gave Chuning a 2- or 3-day suspension for there were no witnesses to the fight. Diane Crawford could not be considered a less disinterested or unbiased witness than the Barnes brothers, Daves, Reeve, or any other employee who saw the fight.

⁷⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁷⁸

The Respondent, Bohemia, Inc., Culp Creek, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about the statements, affidavits, or depositions given to investigators from the National Labor Relations Board.

(b) Telling employees that they or other employees have been discharged because of their union or other protected concerted activities.

(c) Discharging or otherwise disciplining employees and failing to reinstate them for the purpose of discouraging employees from engaging in union or other protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Robert D. Mock immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and

make him whole for loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from Respondent's files any and all references to the discriminatory termination of employment of Robert D. Mock on February 20, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Culp Creek, Oregon, facilities, copies of the attached notice marked "Appendix."⁷⁹ Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

⁷⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁷⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."